In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1102

THE MONTREAL TRUST COMPANY, AS EXECUTOR OF THE ESTATE OF ISIDOR J. KLEIN, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States instituted this action in the United States District Court for the Southern District of New York against the estate of Isidor J. Klein, a deceased Canadian resident, in order to reduce to judgment income tax assessments (including penalties and interest) which had allegedly arisen from income realized by Klein from various transactions in New York. Service upon Klein's Canadian executors was made under the New York "long-arm" statute (Section 302 (a)(1), New York Civil Practice Law and Rules, 7B McKinney's Consolidated Laws of New York, Annotated), which confers "personal jurisdiction over any non-domiciliary, or his executor

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or administrator, as to a cause of action arising from" the transaction of business in New York.[1] Without filing an answer, petitioner, one of the estate's executors, challenged the jurisdiction of the district court, alleging that service upon it was unauthorized under the New York statute. After a preliminary hearing, the district court ordered the service set aside, on the ground that "it does not appear that plaintiff's claim arose from the transaction of any business by Klein within the State of New York" (App. 12a).[2] On the government's interlocutory appeal (28 U.S.C. 1292 (b)), the court of appeals, by a two-to-one-vote, reversed the decision of the district court. The majority held (Pet. App. 22–23):

> We are satisfied here, that Klein, through the activities conducted by his agents in New York, transacted sufficient business in this state to justify the government's service of process upon his estate pursuant to the provisions of New York's "long-arm" statute.

The decision of the court of appeals turned on an evaluation of the particular facts of this case, and no issue is presented warranting review by this Court. The dissenting judge agreed in large measure with the majority's resolution of the broad legal questions (Pet. App. 28–37), and he stated the issue on which he dissented as "whether Klein was engaged *through agents* in New York * * * in transacting any busi-

[1] In *United States* v. *First Nat. City Bank*, 379 U.S. 378, 381, this Court noted that this New York statute might be available to effect personal service upon a nonresident alien taxpayer.

[2] "App." refers to the government's appendix in the court of appeals.

ness out of which the government's claim against Klein for income taxes arises" (Pet. App. 37, emphasis in the original). His disagreement was based on his conclusion that "[u]nder well recognized principles of agency law, neither Williams nor Schutz were agents of Klein upon the facts as found by the district court and accepted by the majority" (Pet. App. 40). The relevant principles of agency turn wholly on the resolution of questions of New York law, and they were so considered by the dissenting judge below (Pet. App. 40–52). The majority of the court of appeals concluded that it was reasonably inferable from the testimony and documents in the record that Klein exercised the necessary control over the individuals who were deemed to be his agents (Pet. App. 21, n. 5). This mixed issue of fact and New York law, resolved by the court of appeals with the aid of a recent decision of the highest court of the State,[3] obviously presents no question appropriate for resolution by this Court.

Petitioner's contention that this case presents a constitutional issue is insubstantial. If, as the majority below determined, it is inferable from the record that Klein exercised control over individuals who engaged in substantial activity in New York, there is no basis for challenging the constitutionality of New York's *in personam* jurisdiction over Klein. *E.g., International Shoe Co.* v. *Washington,* 326 U.S.

[3] *Longines-Wittnauer* v. *Barnes & Reinecke*, 15 N.Y. 2d 443, certiorari denied *sub nom. Estwing Manufacturing Co.* v. *Singer*, 382 U.S. 905, which was relied upon by the court of appeals (Pet. 22–23), was not available to the district court.

310. Nor is there any merit to the claim that the court of appeals exercised "novel" or improper powers in remanding the case to the district court at this juncture (Pet. 10–12). A remand to the district court with instructions that it assume jurisdiction and proceed to a decision on the merits is the most appropriate disposition of "the type of case where the question of jurisdiction is dependent on decision of the merits." See *Land* v. *Dollar,* 330 U.S. 731, 735, 739.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

HAROLD C. WILKENFELD,
Attorney.

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